IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 9TH APRIL 2007 / 19TH CHAITHRA 1929

WP(C).No. 4251 of 2007(F)

IA.210/07 IN OS.166/1999 of SUB COURT, OTTAPPALAM

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PETITIONER:

FATHIMA @ FATHIMABI,
W/O.LATE PALLATH HAMSA,
ARAKURSI AMSOM AND DESOM,
MANNARKKAD TALUK, PALAKKAD DISTRICT.

BY ADV. SRI.K.P.DANDAPANI
SRI.K.MUHAMMED SALAHUDHEEN

RESPONDENT:

AVARA HAJI,
S/O.KATTUKANDAN KUNHAMMED HAJI,
KULUKKAILIYAD AMSOM AND DESOM,
OTTAPPALAM TALUK,
PALAKKAD DISTRICT.

BY ADV. SRI.G.SHRIKUMAR
SRI.SREEJITH S.NAIR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 09/04/2007 ALONG WITH WPC NO. 4252 OF 2007 AND WPC NO. 4253 OF 2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.P. Balachandran, J.

W.P.(C)Nos.4253, 4252 & 4251 of 2007 F

JUDGMENT

The first of these writ petitions is filed against the order passed by the Sub Court, Ottapalam on I.A.No.20/07 in O.S.No.166/99, the second writ petition is filed challenging the order passed by the court below on I.A.No.138/07 and the third one is filed impugning the order passed by the court below dismissing I.A.No.210/07.

2. I.A.No.20/07 is an application filed by the petitioner/defendant in the suit to hear the audio cassette produced by her and to admit it in evidence. I.A.No.138/07 is filed for sonogram test being conducted of the talk recorded in the cassette. I.A.No.210/07 is filed to re-call PWs 1 and 2, while playing the cassette and to confront them with the statements in the cassette.

3. The cassette is one, which is stated to have been recorded by DW5, the son of the petitioner/ defendant. The cassette was produced in court on 10.1.2005 along with I.A.No.185/00. While PWs 1 and 2 and DWs 4 and 5 were being examined, though certain questions were put to them in relation to the cassette, wherein the alleged talk between PW1 and DW4 as also between PW2 and DW5 were recorded, no attempt was made to have those cassettes marked in evidence. Assailing the orders passed by the court below, it is contended by the learned senior counsel appearing for the petitioner that it is one thing to admit the cassette in evidence and that it is a different matter to admit the contents of the cassette in evidence and that the court below is not justified in rejecting reception of the cassette in evidence, disabling PWs 1 and 2 being confronted with certain statements made by them, as recorded in the cassette. Even in the affidavit evidence filed by the respondent/plaintiff in lieu of the chief examination, in paragraph 7, it is

stated that the cassette produced by the petitioner/defendant does not contain any talk by the respondent/plaintiff and that there had been no talk between himself and the defendant or her son and that the cassette has been produced creating some evidence mischievously and that the document produced as if that is the contents of the cassette is not any talk which he had with the defendant. The said statement has not been cross-examined at all and nothing was asked in cross-examination as regards the recorded cassette produced in court.

4. Petitioner is the defendant in the suit and she is the mother of DW5, who is stated to have recorded the telephonic talk in the cassette. According to the petitioner, the telephonic talk she had with the respondent/plaintiff as also the telephonic talk DW5 had with PW2 were recorded by DW5 from the telephone with speaker phone facility and that the telephonic talk so recorded with a written copy of the contents of the said cassette has been produced before court. Even, while so

deposing, no attempt at all was made to have the cassette marked in evidence; leave alone the admissibility of the contents therein. In cross-examination, she has stated that she is not aware as to the time, date, month or year in which she had telephonic talk with PW1. She has also stated that her son is having prior acquaintance with PW1. When she was asked as to after how much period was the cassette produced in court after its recording, she has stated that she does not remember that. She had no explanation when asked as to why the cassette was not produced in court immediately after it was recorded. Again when she was asked as to why no steps were taken to have appropriate action taken as regards the cassette before the suit came up for trial in the list, she has stated that it is necessary only when evidence is taken. She has also stated that she is not aware of the voice of either PW1 or PW2 and that the cassettes were being recorded by her son. In chief examination, the petitioner has stated that her

contention in the written statement is that her son had taken certain blank cheque leaves signed by her, along with signed stamp paper, signed blank papers and photostat copy of her title deed in relation to the scheduled property for availing of a loan from the Bank and that he lost them while travelling in motor bike and that the respondent might have, somehow, came into possession thereof. But, when examined, she said that the signed blank papers were being obtained by the respondent/ plaintiff from her son and he was bringing into existence the suit agreement on the signed blank papers. This is not consistent with the contention in the written statement.

5. DW5, the son of the petitioner/defendant has stated in the affidavit filed in lieu of the chief examination that he was highly indebted and on his failure to pay even the interest, the creditors asked for records by way of security and as he had no property, they demanded the title deed in relation to the property owned by his mother and

being aware that his mother will not give documents to be delivered over to the creditors, he gave her to understand that the documents are required for availing of a loan from the Bank and he entrusted the documents obtained from his mother, the petitioner/defendant to the respondent/plaintiff and to his mother, who made enquiries after two months, he disclosed that loan could not be made available and the records were lost from him while he was travelling on motor bike. He further stated that believing his statement, his mother gave complaint in the matter to the police station; that he disclosed the real fact to his mother only when the present suit was filed by the respondent/ plaintiff; that it is to convince his mother as regards the truth of the matter that he made a call to the respondent/plaintiff from the telephone in his house and caused his mother to talk to the respondent/plaintiff and that the said talk has been recorded in the cassette. He further stated that similarly he had talked to PW2 Purushothaman

and that the same is recorded in a different cassette.

6. Petitioner has already stated, when she was examined, that she does not know the number to which the telephonic call was made and she talked to the respondent/plaintiff. According to DW5, a written version of the telephonic talk is also produced in court, for the reason that being more than one year after recording, there is every chance of the talk so recorded getting erased and the cassette itself being rendered unworthy of use. Thus, even the person, who has recorded the cassette, has stated that after an year, it is likely that the recorded cassette will be rendered useless and that it is, therefore, that he has produced a written version as well. According to DW5, the talk was being so recorded, after filing the written statement in court by his mother. The cassette was, however, produced in court on 10.1.2005. Thus, it is more than one year after its recording that it was produced before court and

I.A.No.20/07 was filed to hear the audio cassette only on 2.1.2007, almost two years thereafter. Obviously, as DW5, who has recorded the cassette, has stated, the cassette might have been rendered useless by this time, by lapse of time. He has further admitted in cross-examination that the contention raised in the written statement by his mother is not true and that such a contention is raised because he has given her to understand that the records were being lost, while he was travelling on his motor bike and not that it was handed over to the respondent/plaintiff. However, he has admitted further that a criminal complaint has been filed against PWs 1 and 2 and the attestors therein by his mother, believing his version that signed blank papers, signed blank cheque leaves, etc., were being lost while he was travelling on motor bike; that in the said criminal case, he is Witness No.1 and that he has provided necessary documents to his mother for the purpose of that case, including photocopy of the suit

agreement in the case and two cassettes, one containing the talk between himself and PW2 and the other containing the talk between the petitioner and the respondent. According to him, the said two cassettes were produced before the Magistrate's Court on 3.12.2003, namely, more than one year before the cassette was produced in this case. He further stated that the cassettes produced before the Magistrate's Court are the originals recorded by him and that the cassette produced in this case contains the copies of the said recorded cassettes. All the same, he is not aware as to when the copy was taken from the original and how. According to him, copy was being taken through the Advocate and that was after production of the cassettes before the Magistrate's Court; that he is not aware as to who copied from the original and that he knows only that the cassette's copy produced in this case was given to him by his Lawyer. He has further admitted in cross-examination that the original cassettes recorded by him had not been sealed; that the

written statement in this case was filed on 2.6.2000 and it is within one week thereof that the telephonic talks were had and were recorded in the cassettes. If so, the recording of the cassettes must be in June 2000; its production in Magistrate's Court must be on 3.12.2003, as stated by him; alleged copy thereof was obtained and produced in court only on 10.1.2005 along with I.A.No.185/00 and attempts made at having it got played in court is made only in 2007, after the evidence is closed, without making any attempt to have it admitted in evidence during trial.

7. From the evidence of the petitioner/ defendant and DW5, her son, it is seen that the petitioner is dancing to the tunes of DW5; that both of them are experienced in conduct of cases and have filed several complaints, as admitted by them, even against the Lawyers, who filed complaints against them on behalf of their parties and are veteran litigants. It is in this background that the request to have the cassettes played in

court and to permit the petitioner to cross-examine PWs 1 and 2 in the light of the statement made has to be considered.

8. Admittedly, the cassette produced in court in this case is a copy of the original, of which, original itself was not sealed or properly kept till its production before the Magistrate's Court. As to who re-recorded the cassette produced, which is admitted to be a copy, is not known either to DW5 or to the petitioner. The version of DW5 that a written version of the recorded talk is also produced, as after one year, the recording may get destroyed and the cassette itself will become useless is an anticipatory bail with a view to explain away either the absence of the talk in the cassette or a different distorted version in the cassette. To permit the cassette being played in court, which is not the original, but, admittedly a copy, the genuineness of which cannot be vouchsafed even by DW5, is nothing but an attempt to protract the litigation.

9. It is worthy to note that there is no sufficient evidence to enable reception of the re-recorded cassette produced in this case as a true copy of the original and no circumstance exists to accept it as secondary evidence. Going by the evidence of the petitioner and DW5 in the matter of cassette, I am of the view that the petitioner is only a stooge in the hands of DW5 as regards the testimony of whom the most charitable comment that I can make is that he is unreliable to the core. I do not find any reason why the re-copied cassette produced in this case, which has admittedly no authenticity, is to be allowed to be played and PWs 1 and 2 being allowed to be cross-examined either on the basis thereof or on the basis of the written version of the alleged recorded statement or to forward the cassette produced before the court, which is not admissible in evidence, for sonogram test.

10. The decision cited by the learned senior counsel for the petitioner, viz., **Ram Singh v. Col.**

Ram Singh (AIR 1986 SC 3) or the decision of this Court in **Pootholi Damodaran Nair v. Babu** (2005 (2) KLT 707) are carefully perused by me already and those decisions only support the view that I have taken as aforesaid and the arguments based on the said decisions are also of no avail to the petitioner.

In the result, confirming the orders of the court below on I.A.Nos.20/07, 138/07 and 210/07, I dismiss all these writ petitions with costs to the respondent.

9th April, 2007 (K.P.Balachandran, Judge)

tkv